No. 2783.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Louisa Pickens and Johanna Schutt,

Appellants.

vs.

J. H. Merriam, Eugene Wellke, Alma J. Schmidt, Amanda Katzung, Minnie S. Farnsworth, Corrine Loveland and Don Ferguson,

Appellees.

PETITION OF APPELLEE MERRIAM FOR REHEARING.

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Supplementing the petition of his codefendants, appellee Merriam (herein, for brevity, designated "petitioner"), to the end that the court may have before it the points which differentiate his case from that of the other appellees, respectfully prays the court to grant him a rehearing, for the reasons therein and herein stated. This may appropriately be done, as petitioner made a separate motion for the dismissal of the cause

as to him [tr. pp. 40-43], based on grounds additional to those raised in the motions of the other defendants, among them, that he was improperly joined as a party defendant, and that the bill was wholly without equity as to him.

Both the complaint and the decision of this court seem to assume that there was an obligation on the part of the administrator of Jeanette Fensky's estate to trace back to its original source the money by which any property belonging to the deceased person was purchased, and that property formerly owned by her, and shown by the record of the very deeds given by these complainants themselves to have been obtained by purchase, was not in fact obtained by purchase, but by descent; also that it was the duty of the administrator to know that persons who were not related by blood to the decedent were her sole heirs, when those very persons, having full knowledge of the pendency of the proceedings, were not themselves claiming to be sole heirs or heirs at all. Also that it was his duty to know that the property of said deceased husband was in fact separate property, and not community property, contrary to the showing of the record which complainants had themselves permitted to stand all those years. In fact, the effect of the decision is such that any administrator would, at his peril, administer upon the estate of a deceased, unless he was gifted with omniscience.

It is important, at the outset, to attract the attention of the court to the fact that it is erroneously stated in the opinion (p. 17) that "the relief sought is * * * an accounting by the defendant Merriam, the adminis-

trator of the estate of Jeanette Fensky, for *so much of the estate* as has come into his hands *and for which no account has been rendered.*" An examination of the bill will show that the only relief prayed against petitioner is that he "be required to account to these complainants for their distributive shares of the estate of the said Jeanette Fensky, which came into his hands and which was *by him distributed* to the said Wellke, Katzung and Schmidt" [tr. p. 29]. It is not alleged in the bill that by any act of petitioner (or, for that matter, of Wellke, Katzung or Schmidt), complainants were prevented from either knowing the facts upon which they could have established any claim which they might have in the estate of Jeanette Fensky, or in any manner preventing them from acquiring knowledge of such facts, or setting up their claims regarding any other question adjudicated by the decree of distribution. Nor is it alleged that petitioner, at the time of the institution of this suit, had any right or power to act as administrator of the estate of Jeanette Fensky, or that he then had, or now has, any property belonging to said estate, or that any property of the estate came into his hands as administrator which he has not administered and distributed under the authority of the probate court. It is not stated that petitioner had anything to do with the administration of the estate of Ferdinand Fensky, either in California or in Kansas, or with procuring the deeds from the complainants to Jeanette Fensky, or that he represented any of the parties in interest in any of said transactions, or that he participated in or knew about any of the alleged frauds claimed to have been perpetrated by Jeanette

Fensky and Campbell. All that is alleged in this respect is that he knew that the deeds from Jeanette Fensky to the other appellees had not been delivered and that he omitted to include in his inventory other property belonging to her estate, and that he knew the persons to whom the property was distributed were not entitled to it.

What the bill further charges and fails to charge, so far as it concerns petitioner, may be summarized as follows:

August 7, 1903, Ferdinand Fensky died, leaving an estate consisting of real and personal property, some in Kansas and some in California; July 29, 1904, and August 3, 1904, complainants, respectively, executed and delivered to Jeanette Fensky their quitclaim deeds conveying to her all their interest in the estate of Ferdinand Fensky [tr. p. 17]; March 30, 1905, Jeanett Fensky filed her final account which was approved and she was forthwith discharged [tr. p. 18]. September 18, 1907, Jeanette Fensky signed and acknowledged several deeds to certain of the defendants (other than Merriam) conveying property situate in California, which had been distributed to her in the proceedings had for administration of the estate of her deceased husband. July 8, 1908, Jeanette Fensky died, and "a few days after her death" the deeds were recorded, "but were made and acknowledged several months before she died" [tr. p. 27]; August 1, 1908, petitioner was appointed administrator of Jeanette Fensky's estate [tr. p. 22]; the petition for his appointment was made by defendants Eugene Wellke, Amanda

Katzung and Alma J. Schmidt, whom petitioner represented [tr. p. 22]; September 8, 1909, petitioner filed his inventory and final account and distributed the property to certain of the defendants [tr. pp. 23 and 25]; that said final account falsely set forth that said Eugene Wellke, Amanda Katzung and Alma J. Schmidt were the sole heirs at law of said Jeanette Fensky [tr. p. 23]; that "complainants * * * pending the proceedings in the superior court of Los Angeles county, California, involving the administration of the estate * * * of the said Jeanette Fensky, *paid attention to said proceedings, and from time to time secured copies of papers that were filed therein*" [tr. p. 27].

It is not alleged that the complainants (who had actual knowledge of said proceedings) *made any claim that they were the heirs of Jeanette Fensky;* nor is it alleged that any facts were brought to the attention of petitioner, or known by him, upon which such heirship could be predicated, nor from which he could infer that the property constituting her estate was not her separate property, nor that any part of it, nor what part, if any, had come to her from the estate of her deceased husband; nor what the character of it might have been at the time of the death of such husband.

Even if it had been alleged that facts were brought home to the administrator sufficient to charge him with knowledge of the alleged invalidity of the deeds of complainants, he certainly had no right and no power, as such, to set aside or ignore such deeds, especially in the absence of any claim being made on their behalf therefor. And if the administrator did not, and, in

the nature of things, could not, have any knowledge that the complainants were the heirs of Jeanette Fensky, there was no duty imposed upon him to disclose to strangers claiming no interest in the estate, and who were not shown by the record to have any interest therein, the fact that certain deeds executed by the deceased to the heirs of the estate were not, in fact, delivered before her death, even if he knew that to be the fact.

The facts alleged in the bill disclose no cause of action against petitioner. No accounting is sought from him except for property which he has distributed. And, it would seem not to require argument or citation of authority that as to property distributed he could not be compelled to account.

In considering the questions under discussion, it should be borne in mind that there was no fiduciary relation existing between petitioner and complainants, or between them and Jeanette Fensky and Campbell. (Appellee's brief p. 32.) This position is well supported by Herron v. Herron, 71 Ia. 428, 32 N. W. 407. There the plaintiff urged that the defendant's possession as administrator created a fiduciary relation between the parties; but the court held otherwise, saying:

> "Clearly, this position is not tenable. Defendant did not occupy a position of trust or special confidence towards plaintiff. She did not deal with his attorney in her capacity as administratrix of the estate. On the death of John Herron, the real estate of which he was seized descended in equal shares to plaintiff and defendant. Her interest in the property was a personal interest. In her representative capacity she had no interest

whatever. It was a case of tenants in common dealing with each other with reference to the common estate. Neither of the parties was charged with the duty of protecting the rights or guarding the interest of the other in the property. They stood upon an equality, and clearly there can be no presumption of unfairness or fraud in the transaction." (Pages 407-8.)

See also:

In re Pearsons, 98 Cal. 603;
Elliott v. Higgins, 83 N. Car. 459-462;
Barker v. Barker, 14 Wis. 142.

Here, if the deeds signed and acknowledged by Jeanette Fensky were not delivered, no title passed by them to the grantees, and, upon her death, the title vested immediately in those who were entitled to succeed to her estate, subject to the control of the probate court and *to the possession of any administrator appointed by that court for the purpose of administration.* (Civil Code, Sec. 1384; Brenham v. Story, 39 Cal. 179.) No *title* vested in petitioner, as administrator.

If, as alleged in the bill, the accounts of petitioner as administrator of the estate of Jeanette Fensky were allowed, and a decree of distribution was entered, the order allowing the account and making distribution are final and conclusive.

"The settlement of the account and the allowance thereof by the court, * * * is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, their right to move for cause to reopen and examine the account, or

to proceed by action against the executor or administrator, either individually or upon his bond, *at any time before final distribution;* and in any action brought by any such person, the allowance and settlement of the account is *prima facie* evidence of its correctness."

Cal. C. C. P., Sec. 1637.

That such decree is conclusive on all parties interested has been repeatedly declared by the supreme court of California.

Tobelman v. Hildebrandt, 72 Cal. 313, 316;
Washington v. Black, 83 Cal. 290;
Reynolds v. Brumagim, 54 Cal. 254.

If it should be suggested, contrary to the theory of the bill, that a decree of distribution has not been entered in the estate of Jeanette Fensky, the complainants have an adequate remedy by applying to the probate court to compel the administrator to include any omitted property in his inventory, and, upon his refusal to do so, to have him removed.

Cal. C. C. P., Secs. 1451, 1436;
Estate of Bell, 135 Cal. 194;
Estate of Newell, 18 Cal. App. 258;
Estate of Bauquier, 88 Cal. 302;
Mesmer v. Jenkins, 61 Cal. 151.

"Whenever property not mentioned in an inventory that is made and filed, comes to the possession or knowledge of an executor or administrator, he must cause the same to be appraised in the manner prescribed in this article, and an inventory thereof to be returned within two months after the discovery; and the making of

such inventory may be enforced, after notice, by attachment *or removal from office.*"

Cal. C. C. P., Sec. 1451.

"Whenever a judge of the superior court has reason to believe from his own knowledge, or from credible information, that any executor or administrator * * * has committed or is about to commit a fraud upon the estate, * * * he must, by an order entered upon the minutes of the court, direct such executor or administrator to be cited to appear and show cause why his letters should not be revoked, and may also suspend the powers of such executor or administrator, until the matter is investigated."

Cal. C. C. P., Sec. 1436.

Upon the death of Jeanette Fensky those who were entitled to the property under the provisions of section 1386 of the Civil Code of California (whether complainants or the persons to whom the same was distributed) became immediately vested with the full title to the property, subject only to the right of administration; and no title at any time was vested in petitioner as administrator.

Cal. Civil Code, Sec. 1384;

Brenham v. Story, 39 Cal. 179.

If, as is the only fair inference from the allegations of the bill taken on demurrer, the administration of the estate of Jeanette Fensky was closed prior to the filing of the bill, the complainants have a plain remedy in the ordinary course of law by applying to the probate court to open the proceedings and have an adminis-

trator appointed to administer the newly discovered property, or to have the newly appointed administrator of the estate bring actions to recover any property belonging to the estate.

> "The final settlement of an estate, * * * shall not prevent a subsequent issue of letters testamentary or of administration, or of administration with the will annexed, if other property of the estate be discovered, or if it becomes necessary or proper for any cause that letters should be again issued."
>
> Cal. C. C. P., Sec. 1698.

In such case the jurisdiction of the court over the estate continues as to subsequently discovered property of the deceased.

> Sheils v. Nathan, 12 Cal. App. 604.

Again, the heirs of Jeanette Fensky are expressly authorized by the statutes of California to maintain and prosecute any actions necessary for the recovery of any property of which she died possessed.

> "The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against anyone except the executor or administrator; but this section shall not be so construed as requiring them so to do."
>
> Cal. C. C. P., Sec. 1452.

Wherefore, for the reasons here and in the petition of his codefendants urged (all of which petitioner adopts and asks to be considered as a part of this peti-

tion) petitioner respectfully prays that the decision of this court reversing the judgment of the district court be set aside and petitioner granted a rehearing.

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The undersigned, counsel for petitioner, hereby certify that in their judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

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